No. 80-1256

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANKLIN J. FLOCKS
Attorney at Law
260 Sheridan Avenue, Suite 414
Palo Alto, California 94306

Telephone: (415) 326-6625

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	i
ARGUMENT	1
CONCLUSION	10
PROOF OF SERVICE	11

TABLE OF AUTHORITIES

Cases

City of Vermillion v. Stan Houston Equipment Co., 341 F. Supp. 707 (S.D.S.D. 1972)	5
Commonwealth of Kentucky Dept. of Rev. v. United States, 383 F. 2d 13 (6 Cir. 1967) 1025 (1968)	3
In Re Decker's Estate, 355 Pa. 331; 49 A.2d 714 (1946) cert. denied sub. nom. Decker v. Kann, 331 U.S. 807 (1947)	3
In RE: Estate of Adolph P. Berretta, Nos. 11 and 22; (Jan. Term, 1979), _Pa._, _A.2d_, (Mar. 13, 1981)	2
James Talcott v. Roto American Corporation, 123 N.J. Super.183, 302 A.2d 147, 151 (1973)	5

	Page
Meyer Estate 159 Pa. Super. 296, 48 A.2d 210 (1946)	3
National Surety Corp. v. Sharpe, 236 N.C. 35; 72 S.E. 2d 109 (1952)	3
Nesbitt v. United States, 622 F. 622 F.2d 433 (9th Cir. 1980)	3
United States v. Crittenden, 563 F.2d 678 (5th Cir. 1977), 440 U.S. 715, 723 (1979)	6
United States v. Kimball Foods, Inc., 440 U.S. 715 (1979)	6
United States v. S.K.A. Associates, Inc., 600 F.2d 513 (5th Cir., 1979)	5
United States v. South Carolina, 227 S.C. 187, 87 S.E.2d 577 (1955)	3
United States v. Vermont, 317 F.2d 446 (2nd Cir. 1963), aff'd 377 U.S. 351 (1964)	6

Statutes

26 U.S.C §6323(a); (I.R.C. of 1939 §3672); (Act of March 4, 1913, Ch. 166, 37 Stat. 1016) ("The Federal Tax Lien Act")	2, 4, 6, 7, 8, 10
31 U.S.C. §191 (Rev. Stat §3466) ("The Insolvency-Priority Statute")	3, 5, 6, 7, 8, 10

Miscellaneous Authorities

	Page
ABA Journal, October, 1970, Volume 56, p. 991	8
Legislative History of the Federal Tax Lien Act of 1966, 89th Cong., 2d Session	9, 10

No. 80-1256

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARGUMENT

I. The decisions of the Ninth and Sixth Circuits are in conflict with the decisions of the Supreme Courts of Pennsylvania, North Carolina and South Carolina, the Appellate Department of the Superior Court of New Jersey, the U.S. District Court for the District of South Dakota, and language of decisions of the Fifth and Second Circuits.

A. Pennsylvania

After the Petition for a Writ of Certiorari was filed in the present case, the Supreme Court of Pennsylvania in a 3-3 split decision affirmed a decree of the Orphan's Court holding that a judgment

lien on real property of an insolvent decedent took priority over a later recorded Federal tax lien. In RE: Estate of Adolph P. Berretta, Nos. 11 and 22; (Jan. Term 1979), _Pa._, _A.2d _, (Mar. 13, 1981)[1].

In its Brief in Opposition (hereinafter "Br.") the government correctly points out that the decision in Berretta technically has no "binding precedential value" since it was decided by an evenly divided court. (Br.8, n.4). However, the effect of Berretta is to leave intact the earlier decisions of the Pennyslyvania Supreme Court and the Pennsylvania Superior Court which squarely held that the Federal Tax Lien Act impliedly limits

---

1. As of the date that preparation of this brief was completed, the Official and National Reporter citations to In RE: Estate of Adolph P. Berretta were not yet available. Typewritten copies of the 24-page Opinion in Support of Affirmance and the 7-page Opinion in Support of Reversal may be obtained from the Pennsylvania Supreme Court, Room 456, City Hall, Philadelphia, Pennsylvania 19107.

the scope of the Insolvency Priority-Statute [See In Re Decker's Estate, 355 Pa. 331; 49 A.2d 714 (1946) cert. denied, sub. nom. Decker v. Kann, 331 U.S. 807 (1947) and Meyer Estate 159 Pa. Super. 296, 48 A.2d 210 (1946)]. The government having just lost a major case in the Pennsylvania Supreme Court, cannot now claim that it is in a better position to oppose our Petition for a Writ of Certiorari than it was before the decision in Berretta was announced.

B. North Carolina and South Carolina

The government admits that the decisions of the Supreme Courts of North Carolina and South Carolina[2] are in conflict with the Decisions of the Ninth and Sixth Circuits.[3] (Br.7, n.3). However the

2. See United States v. South Carolina, 227 S.C. 187, 87 S.E.2d 577, 581 (1955) and National Surety Corp. v. Sharpe, 236 N.C. 35, 72 S. E.2d 109 (1952)

3. See Nesbitt v. United States, 622 F2d 433 (9th Cir. 1980) and Commonwealth of Kentucky, Department of Revenue v. United States 383 F.2d 13 (6th Cir. 1967)

government argues that these cases are not significant because they were decided prior to the 1966 amendments to the Federal Tax Lien Act (Br. 7). Judgment lien creditors such as NESBITT have been expressly protected from later recorded tax liens of the Federal government ever since the Federal Tax Lien Act was first amended in 1913. (Act of Mar. 4, 1913. Ch. 166, 37 Stat. 1016). The only thing that the 1966 Amendment to the Tax Lien Act did was to expand the rights of private creditors. Accordingly, the fact that these decisions were decided prior to 1966 is of no significance

C. North Dakota and New Jersey

In her Petition filed on January 23, 1981, NESBITT pointed out that the Decision of the Ninth Circuit was inconsistent with Decisions of the Appellate Department of the Superior Court of New Jersey and the U.S. District Court for the

District of South Dakota (Pet. 17-19)[4]. The government's Brief fails to discuss either of these cases.

D. Fifth and Second Circuits

In her Petition NESBITT pointed out that language of the Fifth Circuit in the recent decision of United States v. S.K.A. Associates, Inc., 600 F.2d 513 (5th Cir. 1979) makes it clear that the 5th Circuit is of the opinion that the Insolvency-Priority Statue gives the government no greater priority than it would enjoy under State Commercial Law. (Pet. 20 n. 21) The government's brief fails to discuss this case.

In her Petition NESBITT pointed out that language of the Second Circuit in

---

4. City of Vermillion v. Stan Houston Equipment Co., 341 F.Supp. 707, 713 (S.D.S.D. (1972) and James Talcott v. Roto American Corporation, 123 N.J. Super.183, 302 A.2d 147, 151 (1973). The citation to Talcott was inadvertently omitted from Footnote 20 of the petition. However, the case is well-known to the government having been cited by the District Court at Pet. App. 15A (n.9).

United States v. Vermont 317 F2d 446, 449 n.3 (1963), aff'd 377 U.S. 351 (1964) clearly shows that the Second Circuit is of the opinion that the Federal Tax Lien Act impliedly limits the scope of the Insolvency-Priority Statute. (Pet. 20-21, n.21). The government's brief fails to discuss the opinion of the Second Circuit in United States v. Vermont.

II. The decision below conflicts with controlling principles announced in the decisions of this court.

In her Petition NESBITT pointed out that the decision of the Ninth Circuit was inconsistent with the plain language of decisions of this court announced in United States v. Kimball Foods, Inc., 440 U.S. 715 (1979), and its companion case, United States v. Crittenden, 440 U.S. 715, 723 (1979). The government would have this court believe that Kimball should be limited to its facts so that it applies

only when the private creditor is solvent and has enough money to pay all of his creditors.(Br.5-6). We submit that such a narrow interpretation is not warranted.

III. The fact that congress has not enacted proposed legislation which would have expressly stated that the Insolvency-Priority Statute has no application to a creditor who is expressly protected from claims of the government under the tax lien act is of no significance.-- Such a statute would have merely been declarative of existing law.

We acknowledge that buried in the hundreds of pages of legislative history of the 1966 Amendments to the Federal Tax Lien Act is a proposal which would, if it had been enacted, have clarified that the Insolvency-Priority Statute is not applicable to a private creditor who is expressly protected from the claims of the government under the terms of the Federal Tax Lien Act. The opinion of the District Court makes it clear that this legislation was not enacted because of some dissatisfaction with it on the part

of congress. Rather congress "failed to act on the ABA's proposal...apparently because the ABA's recommendation affected many federal claims in addition to tax claims and, therefore, fell outside the jurisdiction of the congressional committees that considered the ABA's proposed tax lien legislation." (Pet. App. 19A-20A). The ABA has stated that one of the purposes of its proposed legislation was to "provide (and partly to clarify) that the priority conferred by (section 3466) is inapplicable as against competing liens." ABA Journal, October, 1970, Volume 56, p. 991 (Emphasis added.) It must be remembered that at the time the 1966 amendment to the Federal Tax Lien Act was enacted, the idea that the government might be able to use its priority under §3466 to defeat the claim of a private creditor whose lien was superior to that of the government under the terms of the Tax Lien Act was very novel. The govern-

ment had made this argument in court on several occasions but it had lost every case. All of the cases that the government has won on this precise issue were decided after 1966. The 1966 congress had many important tasks besides "clarifying" the meaning of an almost two-hundred year old statute which had never been interpreted in the manner that the Ninth Circuit has now interpreted it. The legislative history of the 1966 Amendment to the Tax Lien Act is exhaustively set forth in the 784-page Legislative History of the Federal Tax Lien Act of 1966, 89th Cong., 2d Session, by the Committee on Ways and Means of the House of Representatives. This document contains not one word which would suggest that anyone even hinted to the Congress that the government planned to use its priority under §3466 to attempt to defeat the liens of persons expressly protected from claims of the government by §6323. In the course of its hearings,

Laurens Williams, Chairman of the Special Committee on Federal Tax Liens of the American Bar Association, addressed the House Committee on Ways and Means. Despite the fact that the American Bar Association had earlier proposed legislation which would have completely rewritten §3466, Mr. Williams expressed great satisfaction with the bill as written. There is nothing in Mr. Williams' remarks which would suggest that he believed it necessary to amend §3466 in order to protect persons expressly protected from the claims of the government by §6323. Legislative History of the Federal Tax Lien Act of 1966, supra, at pp. 104-117.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

April 27, 1981

/s/
Franklin J. Flocks
Attorney for Petitioner

No. 80-1256

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARIE D. NESBITT, Petitioner

v.

UNITED STATES OF AMERICA, ET AL., Respondents

Proof of Service

I, Franklin J. Flocks, attorney for petitioner, MARIE D. NESBITT herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of April, 1981, I deposited in a United States post office, located at Palo Alto, California, with first class postage prepaid, three copies of the foregoing document, in envelopes addressed to each of the parties required to be served in this proceeding. The envelopes were addressed as follows:

Solicitor General, Department of Justice
Washington, D.C. 20530

Thomas Alborg, Esq.
Safeco Title Insurance Co.
417 Montgomery Street
San Francisco, California 94104

William Cirimeli, Esq.
500 Airport Boulevard, Suite 352
Burlingame, California 94010

Thomas M. O'Connor, City Attorney
Virginia J. Lum, Deputy City Attorney
206 City Hall
San Francisco, California 94102

George Deukmejian, Attorney General
Ernest P. Goodman, Assistant Attorney General
Timothy G. Laddish, Deputy Attorney General
6000 State Building
San Francisco, California 94102

Dated: April 27, 1981

/s/
Franklin J. Flocks